Superior Court of Cincinnati.

MOSELEY *v.* SCOTT ET AL., OWNERS OF THE STEAMBOAT "PRIMA DONNA."

By the maritime law, seamen must be cured of diseases incurred during their employment, when not produced by their own fault, at the expense of the ship.

The statutes of the United States do not change the rule thus existing, except in the requirement of a medicine-chest on board the vessel, and then there must be proper directions for the administration of the remedies, or a suitable person to prescribe them. The expense of food and nursing are still to be borne by the vessel.

The sailor engaged on board a steamboat on the Western rivers is entitled to the same privileges as merchant seamen on foreign voyages.

The remedy in every proper case is not confined to the admiralty, but may be pursued in the state courts.

S. & R. Mathews, for plaintiff.

Lincoln, Smith, & Warnock, for defendants.

Opinion of the court by

STORER, J.—This case is reserved from special term upon the questions arising upon the demurrer to plaintiff's petition. The plaintiff alleges "that the defendants were the owners of the steamboat Prima Donna, navigating the waters of the rivers Ohio and Cumberland, the boat being duly enrolled and licensed for this purpose under the laws of the United States; that in the month of February 1864, the plaintiff shipped on board the boat at the request and upon the employment of the defendants as cabin boy at the agreed wages of twenty dollars per month for a trip or voyage to Nashville, in the state of Tennessee, and back; that during the voyage the plaintiff became and was sick with the small-pox to such a degree that he was not able to attend to his duty and was compelled to take his bed on the boat and there remain while she was proceeding from Clarksville, Tennessee, to Nashville, and thence to Evansville, in the state of Indiana, of all which the master and officers of the boat had full notice. That by reason of the premises it became the duty of the master and officers to furnish the plaintiff during his confinement, for the cure of his disease, sufficient medicine and medical attendance, nursing, nourishment, lodging, bed and bedding, but they neglected their duty in this behalf, and did not provide and furnish for the plaintiff what was required for his comfort and cure as

before stated, by reason whereof, and by and through the mere neglect, carelessness, and default of the master and officers of the boat in the premises, the hands, feet, and legs of the plaintiff while he was on board sick as aforesaid, became and were frozen, so that the nails of his fingers came off, and it became necessary to amputate both his feet; that in consequence thereof he was confined in the hospital in Evansville, Indiana, for seven months, suffering great pain, and is for ever incapacitated from earning his living by his labor, for all which he claims damages."

To this petition a general demurrer is filed:

The defendants' counsel have taken exception to the mode in which the plaintiff's cause of action is stated, assuming the allegations are not made with sufficient certainty, as well as informally averred. These questions furnish the ground for a motion to make the pleadings more definite, and cannot under the 88th section of our Code be considered in the form they are now presented. Where no specific cause of demurrer is set forth, the only matter for the court to decide is, whether upon the case stated a sufficient cause of action appears.

It is claimed by the defendants' counsel in argument:

First. That the case made by the petition involves the ordinary relation of master and servant only, consequently no obligation is imposed on the employer to provide medical aid under the contract of hiring, or medicine in case of the employee's illness.

Second. If the rule thus stated is not applicable, the plaintiff does not bring himself within the laws of the United States regulating the duties of merchant seamen, or those which apply to ships and shipping on foreign voyages.

Third. If the plaintiff may claim the benefit of these laws, the jurisdiction to afford relief is in the admiralty only.

It is argued that, at common law as well as by the practice of the English courts, there is no obligation on the master to pay for medical aid and the other necessary expenses of his servants' sickness; but this rule, though apparently settled by authority, has been doubted by eminent jurists, and will admit in a proper case of a thorough examination of the grounds upon which it rests.

Prior to the case of *Scarman* v. *Castell*, 1 Esp. N. P. C. 270, it was said by Lord ALVANLEY in *Wennall* v. *Adney*, 3 B. & P. 241, "there is no authority in the aw of England to be found

which warrants the position assumed by Lord KENYON when he decided in a former case 'that an apothecary might recover from a master the amount of a bill for medicine and attendance furnished to and bestowed upon his servant while in the master's house,' and although it was held 'his Lordship's opinion was not an hasty one, but formed upon reflection,' it was nevertheless overruled. Lord ELDON, in *Simmons* v. *Wilmott*, 3 Esp. 93, and Chief Justice MANSFIELD, in *Newby* v. *Wiltshire*, 2 Esp. 739, were much inclined to sustain the opinion of Lord KENYON, but with him were overruled in *Wennall* v. *Adney*. Since then the current of decision is in harmony with the rule announced by his Lordship. We find it so stated in *Sellon* v. *Norman*, 4 C. & P. 81, *Cooper* v. *Phillips*, Id. 581; though we are not able to appreciate the very nice distinction drawn by Judge TAUNTON between the nurse who became sick while attending her mistress's child, and the servant girl who injured her limb, both being in service at the time: See also *Regina* v. *Smith*, 8 C. & P. 153. But it is said by Mr. Smith in his treatise upon Master and Servant, page 120, "It is believed, however, no case has yet occurred in which the case has arisen in an action by a servant against his master who had agreed to supply the servant with necessary food, whether the master in such a case is bound by his contract to furnish physic to his servant in case of illness. When the question shall arise, the decision must depend upon the exact nature of the contract entered into." The English rule is recognised in *Clark et al.* v. *Waterman*, 7 Vermont 76, and by Chancellor KENT, 2 Com.

We have referred to the cases on this branch of the argument, to show that there can be no just analogy between the ordinary hiring of a domestic servant who performs as in England agricultural or menial work only, and one who like the plaintiff has been employed on board a steamboat navigating the waters of the West. The difference in the mode of service, its nature and its perils, distinguish it very clearly from all other vocations except that which is required in the ordinary navigation of maritime vessels. We are not at liberty, therefore, if we would, to regard the rule claimed by the defendants as applicable to the plaintiff's action.

It is further claimed that the laws of the United States defining the duties of "merchant seamen," as well as the liabilities of owners of vessels navigating the ocean, must determine the right

of the mariner to indemnity; in other words, no right exists independent of these enactments.

We do not so understand these statutes, either in their letter or spirit. When they were enacted the right of the seaman already existed, not merely to his ordinary wages, but to all appropriate relief in the admiralty on the general principles of maritime law, and they were auxiliary merely to the existing remedies as they recognised a present right. Thus we find by the ancient marine ordinances, "if a man fall sick during the voyage, or is hurt in the performance of his duty, he is to be cured at the expense of the ship." We use the language of Lord TENTERDEN, in his work on Shipping, chap. 34, page 258. So it is said by Molloy, vol. 2, chap. 3, § 5: "If the seaman do become ill in the service of the ship he is to be provided for at the charge of the ship;" and in Emerigon, in his treatise on Insurance, Meredith Ed. chap. 12, § 41, under the head Illness of Marines, it is stated without reservation that "the sailor who falls sick during the voyage shall be cured at the expense of the vessel," and "sentence," he remarks, "was entered in the French admiralty in 1750, admitting the charge for expenses of illness, in which were comprised the fees of the physician and surgeon, and the wages of a nurse." On this point there would seem to be no doubt by the early authorities; but the whole subject was examined most thoroughly by Judge STORY, in *Harden* v. *Gordon*, 2 Mason 543, who exhausted all the learning his profound investigation could reach, or his untiring industry could gather from the past history of the law. He held, "by the general principles of law seamen are entitled to be healed at the expense of the ship; the claim for such a provision in contemplation of law being a part of the contract for wages, and a material ingredient in the compensation for the labor and services of the seamen." "I have not been able," he says, "to detect a single instance in which the maritime laws of any country throw upon seamen disabled or taken sick in the service of the ship without their own fault the expenses of their cure; this is certainly the law of France, Denmark, Sweden, the Hanse Towns, Russia, and Holland."

The same question arose in the case of *The Brig George*, 1 Sumner 152, in which the law was again fully recognised, and the mate of a vessel was allowed to charge the ship with the

expenses of his cure when attacked with the yellow fever; and again, in *Reed et al.* v. *Canfield*, Id. 195, a seaman whose feet were frozen while in the service of the ship, was held entitled to be cured at the ship's expense. See also *Nevitt* v. *Clarke et al.*, Olcott's Rep. 306, where Judge BETTS decides the same point, and 1 Abbott Adm. Rep. 344, where the same judge reaffirmed the principle; and so in Ware's Rep. 1, case of *The Nimrod*, and the case of *The Brig Forest*, Id. 420, in which the learned judge, as he always does, examines the doctrine from its origin, and fully coincides with Judge Story. See also, *Browne* v. *Taber*, Sprague 457; *Browne* v. *Overton*, Id. 462, 3 Kent Com. 341.

These adjudications were not made upon the remedy given by statute, but placed upon the principle that the laws of the United States relating to merchant seamen are but in affirmance of a right already conferred by the maritime law.

There are some exceptions, however, to the general application of this rule. Thus, by the Act of Congress of July 20th 1790, Brightly 614, "the vessel is exempted from the charge for medical advice for a sick seaman, provided there is on board a medicine chest with suitable directions for administering the remedies," but this requirement does not discharge the vessel from the expense of nursing and lodging, nor from the expense of medical advice when there is no one on board competent to administer the medicine: *Lamson* v. *Wescott*, 1 Sumner 595; *Harden* v. *Gordon*, already quoted; *The Forest*, Ware 420.

How far this provision of the statute may apply in the present case, must depend on the proof offered on trial; it cannot be regarded here, as the demurrer forbids the idea that the officers of the boat had performed their duty, putting in issue only the liability of the owners upon the case made in the petition.

If the rule is thus fully established as to foreign voyages when merchant seamen, as they are denominated in the statute, are employed, may it not be extended to embrace the same class who are engaged in the coasting trade; and does not such trade include the navigation of the western rivers and lakes?

This proposition at once presents an inquiry both important and interesting to all who are engaged in our internal commerce as owners, officers, or crews of steam-vessels.

In *Smith* v. *The Sloop Pekin*, Gilpin 20, Judge HOPKINSON overruled a plea in admiralty where a seaman employed on a

voyage between parts of adjoining states, and on the tide water of a river or bay, libelled the vessel for his wages, when it was sought to dismiss the suit on the ground the court had no jurisdiction; and Judge SPRAGUE, in the case of *Derby et al.* v. *Henry*, 21 Law Reporter 473, sustained a suit *in rem* for wages against a vessel of thirty-five tons burthen, engaged in transporting lumber between Quincy and Boston, the distance of a few miles only; and in *Knight* v. *Parsons*, Sprague 279, it was held that fishermen on mackerel voyages in licensed and enrolled vessels are to be cured at the ship's expense, and the rule applicable to hired seamen on foreign voyages, embraced them also.

By the law of February 20th 1845, Congress invested the District Courts of the United States with very extended powers, conferring jurisdiction in admiralty "in all matters of contract and tort arising in or upon or concerning steamboats or other vessels of twenty tons burthen and upwards, enrolled and licensed for the coasting trade, and at the time employed in business of commerce and navigation between ports and places in different states and territories upon the lakes and navigable waters connecting the same, as are possessed and exercised by the said courts in cases of the like steamboats and other vessels employed in commerce and navigation on the high seas or tide waters within the admiralty and maritime jurisdiction of the United States."

That jurisdiction before the passage of this law was confined to those waters where the tide ebbed and flowed, and was denied by the courts except in that class of cases: *Steamboat Orleans* v. *Phœbus*, 11 Peters 175; *Waring* v. *Clark*, 5 Howard 441..

This law came under consideration in 12 Howard 450, in the case of *The Genesee Chief*, and its constitutionality was fully sustained on the ground that the ebb and flow of the tide did not determine admiralty and maritime jurisdiction, but that the lakes and navigable waters were within the scope of that jurisdiction as known and understood in the United States when the Constitution was adopted.

But it was doubtful whether the navigable rivers of the west were embraced within the terms of the law; and the same court, in *Owners of Steamboat Wetumpka* v. *Steamboat Magnolia*, 20 Howard 296, held that the District Court of Alabama had competent admiralty jurisdiction by the Judiciary Act of 1789, thereby giving their proper character to the vast channels of internal

commerce, navigable not only for vessels of "ten or twelve tons burthen," but for those of equal capacity with ocean ships. See also the case of *The Propeller Commerce*, 1 Black 574.

The legislation of Congress does not stop here; it has required all steamboats to be enrolled and licensed as in the case of coasting vessels; it compels all seamen employed in their navigation to pay into the treasury twenty cents for each month of their service as hospital money, securing thereby the privilege of being cared for as merchant seamen are in the marine hospitals of the government, where any exist, if not, to be cured at the government's expense. By a series of acts beginning in 1812, and from thence continued to the present time, the lading and navigation of boats on the rivers of the United States are specially regulated, the duties of the officers and crews clearly defined, and heavy penalties imposed for their disobedience or neglect.

As early as 1812, by the statute admitting Louisiana into the Union, it was declared "that all the shores and waters of the Ohio river, and the several rivers and creeks entering into the same, as well as all the shores and waters of the Mississippi, and its heads, were made a part of the district of the Mississippi, and surveyors of customs were appointed for various ports on these rivers, among which was Cincinnati:" Brightly 586, §§ 19 and 20; and by a subsequent law of 1831, merchandise may be imported from foreign countries directly to these interior ports, the owner giving bond at the port of delivery for the duties.

If then it can, as we believe, be properly maintained, that for all practical purposes, both as to right and remedy, seamen navigating our great rivers and lakes are to be regarded as merchant seamen, another question arises, have we jurisdiction over the case before us, or is it to be referred to the admiralty exclusively? In all the statutes conferring jurisdiction on the admiralty courts, the Congress of the United States has been careful to confine the authority, where it is exclusively given, to suits *in rem*, and not *in personam;* it is so in the law of 1845, and expressly stated in the law of 1790, regulating merchant seamen; both these enactments reserve to the seaman the right to sue in the common law courts, and this is the construction given by the United States' courts: *New Jersey Steam Nav. Co.* v. *Merchants' Bank*, 6 Howard 390; *Ashbrook* v. *Golden Gate*, Newberry 296; indeed, the numerous decisions we find in the reports of the state courts,

where the rights of seamen are directly litigated with the owners of the vessel, remove all doubt as to their concurrent jurisdiction with the admiralty tribunals. A contrary construction of the law would invest the admiralty with exclusive power over every question touching maritime rights; every claim under a policy of marine insurance, bills of lading, charter-party, and bottomry, would belong alone to that tribunal, and but a small portion of commercial law be left for the adjudication of the common law courts.

The argument of defendants' counsel has extended over a wide field, and is attempted to be sustained by many illustrations, which, though ingeniously put, do not produce conviction.

We have been told the language of the law prescribing the duties of merchant seamen is, that none are regarded as such except every requirement is fulfilled; *ex. gratia*, there must be shipping articles signed before the precise limit of the voyage is ascertained, and the consent of the sailor given to the relation he has assumed, which is in fact to submit to all the penalties thereby imposed before the ship leaves her port. These, and many other provisoes, demanded for the safety of the seaman, as well as the proper discharge of his duties, are declaratory rather than arbitrary in their language. We cannot believe the absence of either precludes the enforcement of any right secured by the maritime law to those who navigate the seas. We suppose the shipping-paper is but the evidence, and the best evidence, of the contract between the owners and master and the seaman; if no such paper exists, the agreement, as in other cases, must be proved by parol, though it may subject all parties to inconvenience, and produce difficulty in establishing their several rights. In the case of *The Trial*, 1 Blatch. & Howland 94, Judge BETTS held that the right of the seaman did not depend on the shipping articles, and he was not obliged to call for them to establish his claim to wages. And Judge HOPKINSON, in *Janson et al.* v. *The Russian Ship Heinrich*, Crabbe 226, decided, "when a sailor enters upon a voyage without signing shipping articles, an implied contract is presumed that he has shipped for the voyage, and he is bound accordingly."

In a similar manner the other objections urged by counsel may be readily disposed of, and the real question which after all is involved in this controversy decided—Are not the seamen on the western waters, who assist in the navigation of enrolled and

licensed vessels, under the Acts of Congress, on every just principle to sustain the same relation to the master and owner as a mariner on a merchant ship engaged in a foreign voyage?

Neither upon authority nor any principle of justice do we understand such a distinction can be properly assumed, much less vindicated. The term foreign voyage, when the law of 1790 was passed, had, we are satisfied, a meaning limited by the then existing condition of things. Our commerce, with the exception of the few vessels engaged in the coasting trade, was principally with Europe and the West Indies. The inland seas of the West were not as well known to our people, either geographically or commercially, as the Mediterranean, the Baltic, or the Euxine; each lake was literally a "*mare clausum.*" The sources of the Mississippi and Missouri had not yet been explored, and were as unknown as those of the Nile, while the navigation of the Ohio and her tributaries was confined to canoes, with the occasional passage of a batteau or a flat-boat.

But in the progress of events this immense basin, whose waters flow into the Atlantic, has unfolded its treasures, and demanded the facilities adapted to its vast resources. Produce must be transported thousands of miles, and the wants of trade supplied; in accomplishing which more degrees of latitude are traversed than are found between New York and London, while the distance between many foreign ports and our own, especially in the British Provinces and the West India Islands, is not to be measured by an ordinary voyage from Pittsburgh to New Orleans.

The millions of products, and the necessities of trade, not only now demand the largest facilities for transportation throughout and beyond our valley, but all the securities for those who take part in the work of locomotion which are granted by the maritime law, should be allowed to the largest extent and with the greatest liberality. Though it is said there are many circumstances attending a foreign voyage which give a peculiar character to the employment of the mariner who engages to perform it, such as the variety of climate, peril of the seas, and a removal from the direct protection of the government, we cannot but believe the duties devolving on the crew of a steamer on our rivers, when fully considered, are equally important, and the dangers to be encountered as imminent as are met in an ocean voyage. There is the same diversity of climate, the same contingencies of tempest,

flood, and collision, the same responsibility as carriers, and the same obligation to labor for the safety of the vessel and cargo, in case of accident.

We confess, that from whatever point of view we consider the question, we are strengthened in our conviction that the western sailor is to every legal intent a merchant seaman, and is privileged to demand the same immunities. We might refer not merely to the physical condition of the West, which has made the extension of admiralty jurisdiction a commercial necessity, to explain our views of the question now in controversy, and we think, without apology for any imagined departure from the points discussed, we may allude to the fact that the last four years have exhibited what has already become historical, that the steamboats upon our rivers and lakes have been the nurseries of thousands of brave men who have manned our naval vessels, and sustained with honor the flag of their country; nor ought we to forget that during the same period these same rivers have floated a larger armed fleet than is sustained by any European government, England and France excepted. There is then a fitness that any real or technical distinction between the ocean and our western rivers, between fresh water and salt water, whether streams flow on continuously or rise and ebb as the sea, should no longer be permitted to exist. The progress of events has removed all reason for any such diversity, and we cannot find any legal principle is violated by extending all the privileges of the statute we have referred to, to our inland navigation. Vessels have already left our ports for foreign countries laden with our own products, and merchandise is directly imported here from every part of Europe, and we may well predict that ere long we shall have ports of entry practically from which there will be a direct communication with every part of the globe. With these views of the future we may well ignore the past, and apply the proper rule for present duty. The case stated in the petition meets every requirement of the maritime law, or the usages of commerce, to constitute a right of action. A seaman within the full protection of the law becomes suddenly ill while on board a steamboat, where he had contracted to serve for the voyage, and up to the time of his illness performed his duty; the owners of the boat, the master and his officers, were bound to furnish medicine, nursing, and medical aid suitable to the treatment of his disease, but he is neglected. In mid-winter,

as he alleges, while on board the vessel, and legally under their care and protection, his limbs are frozen, the nails fall from his fingers, and his feet are afterwards amputated to save his life. All these facts are admitted by the demurrer, and, until they are disproved, establish a clear right to recover. It is to be hoped, when the real state of fact is proved, the case may assume a different aspect. On the pleadings the demurrer will be overruled, and the cause remanded, with leave to answer.

Supreme Court of the United States.

ADAM VAN ALLEN, IN BEHALF OF HIMSELF AND ALL OTHER STOCKHOLDERS IN THE FIRST NATIONAL BANK OF ALBANY, PLAINTIFFS IN ERROR, *v.* MICHAEL A. NOLAN ET AL., AS THE BOARD OF ASSESSORS OF THE CITY OF ALBANY.

Taxation of National Banks by State Authority.

PER CURIAM, all the judges concurring.

1. *Taxation—State law must conform to Act of Congress.*—The Act of Congress of June 3d 1864 authorizes the taxation by the states of shares in the national banks, with this limitation: "that the tax so imposed under the laws of any state upon the shares of the associations authorized by this act shall not exceed the rate imposed upon the shares of any of the banks organized under the authority of the state where such association is located:" *Held*, that a *state* law, providing for the taxation of the *shares* of the *national* banks and for the taxation of the *capital* of *state* banks, but not of the shares, did not conform to the limitation in the Act of Congress.

Argument.—Inasmuch as the capital of state banks may consist of United States securities, which are exempt from state taxation, a tax on capital is not an equivalent for a tax on the shares of the stockholders.

BY THE COURT: CHASE, C. J., and WAYNE and SWAYNE, JJ., dissenting.

2. *Shares taxable without regard to mode in which capital is invested.*—The above Act of Congress authorizes the *shares* in national banks to be taxed by state authority, irrespective of the amount of capital which the bank itself may have invested in the bonds of the United States.

The minority of the court dissent from this view, holding that the states may tax shares in a national bank *only so far* as its capital *is not* invested in United States securities.

Argument.—1. A tax on shares is not a tax on the capital of the bank. The bank, as a corporation, owns the bonds, and not the individual stockholders. Bonds owned by the bank cannot be taxed against the bank; but the interest of the shareholder is an independent interest or property, and may be taxed.

2. The tax allowed is not a tax upon the bonds, but is part of the price of the great powers and privileges conferred upon these banking associations, founded upon a new use and application of the bonds for banking purposes.

[The soundness of these arguments is denied by the dissenting judges.]

3. *Power of taxation concurrent in Congress and the States.*—As a *rule*, the power of taxation is a concurrent power. Congress may withhold the power,